BEFORE THE FEDERAL MARITIME COMMISSION

)
BALTIC AUTO SHIPPING, INC.	,))
COMPLAINANT,))
v.))) DOCKET NO. 14-16)
MICHAEL HITRINOV a/k/a MICHAEL KHITRINOV, EMPIRE UNITED LINES CO., INC.,))))
RESPONDENTS.))

MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION FOR PARTIAL

SUMMARY DECISION DISMISSING COMPLAINT FOR REPARATIONS ON THE

BASIS THAT (1) THE CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS;

AND (2) THE CLAIM IS BARRED BY THE SETTLEMENT AGREEMENT AND

RELEASE

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MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY DECISION DISMISSING COMPLAINT FOR REPARATIONS

The Respondents, Michael Hitrinov and Empire United Lines Co., Inc., by and through their attorneys, The Law Office of Doyle & Doyle, hereby file this Memorandum in Support of Respondents' Motion for Partial Summary Decision Dismissing Complainant Baltic Auto Shipping, Inc.'s Complaint for Reparations.

LEGAL BASIS FOR THE MOTION

Respondents bring this Motion for Partial Summary Decision Dismissing the Complaint for Reparations pursuant to the Shipping Act and Federal Maritime Commission Rule 62 which provide, in part, that a complaint seeking reparation must be filed within three years after the claim accrues (46 USC 41301 (a); 46 CFR 502.62 (a) (4) (iii)). The Complaint herein was filed more than three years after the Complainant's claim accrued and therefore the claim for reparations must be dismissed as time-barred.

Respondents also bring this Motion for Partial Summary Decision Dismissing the Complaint for Reparations as barred by the terms of that certain Settlement Agreement and Mutual Release entered into by the parties to this action on November 29, 2011.

STATEMENT OF MATERIAL FACTS TO WHICH THERE IS NO GENUINE DISPUTE

In large part, the material facts (see below) are taken from the Complaints of the Complainant in this action ("FMC Complaint") (attached as Exhibit 1 in Respondent's Appendix, attached hereto) and in the predecessor action in the Federal District Court in New Jersey¹ ("DNJ Complaint") (attached, without its Exhibits, as Appendix Exhibit 2). In both instances the pleadings

¹ Baltic Auto Shipping, Inc. v. Michael Hitrinov aka Michael Khitrinov, Empire United Lines Co., Inc., Mediterranean Shipping Company (USA), Inc. et al., No. 2:11-cv-06908-FSH.

are judicial admissions², and are being offered not so much for the truth of the matters asserted, but simply for the fact that they were asserted – indicating that the Complainant had a sufficient understanding of its alleged injuries and damages, and the accrual of its claims, more than three years before filing the FMC Complaint. Having had a full understanding in 2011, the Complainant cannot now take the position that the running of the statute of limitations was tolled because there was no "discovery" of the facts. Further, having a full knowledge of its claims, it is bound by the expansive language of the 2011 Settlement Agreement and Mutual Release, which provided for Complainant's

"release, remise and discharge [of Respondents] from any and all manner of claims, actions, causes of actions, ... damages, costs, expenses and/or compensation of any nature whatsoever that [Complainant] now has or may have had on account of or <u>in any way growing out of shipping charges</u> related to [Complainant's] cargo and any claims of <u>damages related to the delay in releasing</u> said cargo from the beginning of time up to the date of this release".

(Settlement Agreement and Mutual Release; 11/29/2011; Art. 5, "Mutual General Release"; attached as Appendix Exhibit 3) (emphasis added)

 Complainant Baltic Auto Shipping, Inc. ("Complainant" or "Baltic") is an FMC-licensed non-vessel-operating common carrier ("NVOCC") and ocean freight forwarder (License No. 021242 NF), and is an experienced exporter, having exported more than 4,000 shipments from approximately November 2007 through November 2011 using the services of Respondent Empire United Lines Co., Inc. ("Respondent EUL" or "EUL"). (Certifica-

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² Gospel Missions of America v. City of Los Angeles, 328 F. d 548, 553 (9th Cir. 2003) (judicial admissions in pleadings in prior action operated to bar party from asserting a conflicting position in the current proceeding). Even if the Complaint in the New Jersey action is not found to be a judicial admission, it certainly qualifies as an evidentiary admission under FRE 801 (d) (2). White v. Arco/Polymers, Inc., 738 F.2d 1391, 1396 (5th Cir. 1983).

In any event, Respondents claim that the New Jersey Complaint is relevant, material and, if not reliable, probative and therefore should be admitted into evidence and considered in ruling on this Motion. This would be in accord with the Commission's liberal evidentiary rules. *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, FMC Docket No. 08-03, "Order granting in part and denying in part Respondent's Motion for Summary Judgment" (January 31, 2013), unnumbered page 8.

- tion of Respondent Michael Hitrinov ["Hitrinov"] \P 3; FMC Complaint, \P 12; see also DNJ Complaint, \P 10) (The Hitrinov Certification is attached as Appendix Exhibit 4)
- 2. It was the practice of Baltic to negotiate freight rates with EUL. (Hitrinov ¶ 4; Appendix Exhibit 5, correspondence attached to the DNJ Complaint as Exhibit "G"; "Payments are made according to agreed rates between Empire and Baltic …"; Baltic to EUL, 11/14/2011; 11:39 AM.)
- 3. Baltic booked shipments on the basis of the negotiated freight rates. (Hitrinov ¶ 5)
- 4. Baltic provided EUL with shipping instructions (titled "Dock Receipts" as they were also used for that purpose as delivery receipts between the party delivering cargo to the terminal, and the terminal operator) that: described the shipment; identified the origin and destination points/ports: contained Automated Export System ("AES") numbers (for U.S. Customs' purposes); identified the EUL booking number; identified some charges to be paid at destination ("collect"); and were endorsed either "Telex Release" or "Express Release". (Hitrinov ¶ 6; see specimen Baltic shipping instructions attached as Appendix Exhibit 6)
- 5. "Telex Release" and "Express Release" mean that no bill of lading is issued to the shipper and no bill of lading needs to be surrendered at destination as a condition of the consignee receiving the shipment at destination. (Hitrinov ¶ 7)
- 6. In an Express Release or Telex Release shipment, the cargo is delivered once the freight charges have been paid, or, if the shipper has credit, on the consignee's demand.
 (Hitrinov ¶ 8)
- 7. The shipments identified in Complainant's Discovery request Exhibits "C", "D" and "E" were all either "Telex Releases" or "Express Releases". (Hitrinov ¶ 9)
- 8. Baltic sent shipping instructions for the shipments identified in Complainant's Exhibits

- "C", "D" and "E" in the period from August 22, 2011 to November 11, 2011. A spread-sheet identifying the specific date for the specific shipment is attached as Appendix Exhibit 7³. (Hitrinov ¶100
- 9. There is no requirement in the Shipping Act or the Federal Maritime Commission's regulations requiring a carrier to issue a bill of lading. (Hitrinov ¶ 11)
- 10. Issuance of a bill of lading is governed by the Carriage of Goods by Sea Act, 1936: "After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading ..." 46 USC 1303 (3) (emphasis added)
- 11. EUL did not issue individual invoices for the freight charges assessed against Baltic. (Hitrinov ¶ 12)
- 12. Because of the great number of shipments and containers to be accounted for, it was the practice of EUL to send spreadsheet statements of account to Baltic identifying each shipment and the amount due. (Hitrinov ¶ 13)
- 13. Baltic paid EUL against such statements. (Hitrinov ¶ 14)
- 14. Except for the claims made in the DNJ Complaint and the FMC Complaint, Baltic never objected to this practice. (Hitrinov ¶ 15)
- 15. In or around September 2011 approximately 162 Baltic containers shipped with EUL were in transit, or arrived, but were not yet delivered, in North Europe. (Hitrinov ¶ 16; DNJ Complaint, ¶¶ 30 34)
- 16. The 162 containers were the last shipments Baltic ever made with EUL. (Hitrinov ¶ 17)

The actual shipping instructions can be made available upon the request of the Tribunal. (Hitrinov ¶ 10).

- 17. Insofar as may be relevant, the shipments identified in Complainant's Exhibits "C", "D" and "E" were loaded "on board" in the period from September 3, 2011 to November 26, 2011. A spreadsheet identifying the specific "on board" date for each shipment is attached as Appendix Exhibit 8⁴. (Hitrinov ¶ 18)
- 18. The bills of lading issued by the vessel operating common carrier, Mediterranean Shipping Company ("MSC") showing the "on board" dates have been supplied to Complainant pursuant to its discovery request (Hitrinov ¶ 19).
- 19. On or about November 14, 2011 EUL amended the freight charges that it claimed were due from Baltic, increasing the amount due by approximately \$175,000. (Hitrinov ¶ 20; DNJ Complaint, ¶¶ 39, 40)
- 20. Baltic disputed the additional charges as already being included in the freight rate charged and refused to pay the charges. (Hitrinov ¶ 20; DNJ Complaint, ¶ 45)
- 21. On November 14, 2011 Baltic demanded that the arrived containers be released, but Empire refused to release the containers until Baltic paid the claimed charges. (Hitrinov ¶ 22; DNJ Complaint, ¶¶ 47 49; see correspondence attached as Appendix Exhibit 5)
- 22. Baltic filed the New Jersey lawsuit on November 23, 2011. (Hitrinov ¶ 23; Appendix Exhibits 9, the Docket Sheet)
- 23. Each and every shipment identified in Complainant's Exhibits "C", "D" and "E" was identified in the Exhibits to the Complaint filed in the New Jersey lawsuit. A spreadsheet showing where the shipment was identified is attached as Appendix Exhibit 7.

⁴ Copies of the MSC "on board" bills of lading will be made available to the Tribunal on request.

- 24. In addition to seeking monetary damages, Baltic sought a Writ of Replevin for the delivery of the containers. (Hitrinov ¶ 25; DNJ Complaint, Count XV, ¶¶118-119, 120 (f)).
- 25. In its November 23, 2011 DNJ Complaint, Baltic alleged that EUL "unlawfully seized Plaintiff's containers and refused to release them" and that EUL was "illegally and unlawfully holding Plaintiff's cargo hostage in exchange for a payment of an artificial and unlawful debt ...". (Hitrinov ¶ 27; DNJ Complaint, ¶¶ 46, 51)
- 26. In its November 23, 2011 DNJ Complaint, Baltic alleged that "Defendants [i.e., Respondents herein] ...contact[ed] Plaintiff's [i.e., Complainant herein] customers, the intended recipients ... and have offered them the goods shipped by Plaintiff at a radical discount ...". (Hitrinov ¶ 26; DNJ Complaint, ¶ 50)
- 27. In its November 23, 2011 DNJ Complaint, Baltic alleged that EUL "was required by law to create and deliver a Bill of Lading and invoice ... to Plaintiff with respect to the Oceangoing ... transport of Plaintiff's vehicles ... (the "House Bills of Lading" or "HBOLs")"; and when Baltic "demanded a copy of all HBOLS and invoices"; "Empire failed and refused to deliver to Plaintiff's HBOLs and invoices ... for the vehicles shipped overseas". (Hitrinov ¶ 28; DNJ Complaint ¶¶ 28, 30, 29)
- 28. In its November 23, 2011 DNJ Complaint, Baltic alleged that "the imposition [by Respondent EUL] of <u>false and excessive shipping charges</u> ... and the <u>unlawful seizure of Plaintiff's cargo</u> is a violation of the Shipping Act of 1984, as amended, as well as rules and regulations promulgated by the Federal Maritime Commission". (Hitrinov ¶ 29; DNJ Complaint, ¶ 61) (emphasis added)
- 29. Shortly after the DNJ Complaint was filed, on November 29, 2011, the parties entered into the Settlement Agreement and Mutual Release. (Hitrinov ¶ 30; Appendix Exhibit 3)

- 30. The Settlement Agreement and Mutual Release recited that in entering into the agreement the parties had "relied on the legal advice of their respective counsel" (Hitrinov ¶ 31; Appendix Exhibit 3, Art. 14, "Advice of Counsel")
- 31. The Settlement Agreement and Mutual Release further recited that "The parties have had the opportunity to consult with and be advised by counsel, and have done so, and have had the opportunity to make whatever investigation or inquiry each may have deemed necessary or desirable in connection with the subject matter of this Agreement prior to its execution". (Hitrinov ¶ 32; Appendix Exhibit 3, Art. 7 (b))
- 32. The Settlement Agreement and Mutual Release provided for the release of the Complainant's 162 containers those arrived but not delivered, as well as those that were expected at destination against the payment of freight charges, storage and demurrage charges, "if any". (Hitrinov ¶ 33; Appendix Exhibit 3, Art. 2)
- 33. Except for two shipments that Baltic booked directly with MSC without using EUL, each of the shipments identified Complainant's Exhibits "C" and "E" were specifically identified in the Settlement Agreement and Mutual Release. A spreadsheet identifying each shipment and its location in the Settlement Agreement and Mutual Release is attached as Appendix Exhibit 7. (Hitrinov ¶ 34)
- 34. The operative "release" language of the Settlement Agreement and Mutual Release provided that the releases were exchanged in connection with claims for "costs, expenses, and/or compensation of any nature whatsoever" "in any way growing out of shipping charges related to Baltic's cargo and any claims of damages related to the delay in releasing said cargo" (Hitrinov ¶ 35; Appendix Exhibit 3, Art. 5) (emphasis added)
- 35. The expansive subject matter (e.g., "any and all"), was complemented by the period of time in which such claims those being released could have accrued: "from the beginning of time up to the date of this release". (Hitrinov ¶ 36; Appendix Exhibit 3, Art. 5).

- 36. All of Complainant's shipments were delivered subsequent to entering into the Settlement Agreement and Mutual Release⁵. (Hitrinov ¶37)
- 37. At all material times, EUL has a published tariff on file. (Hitrinov ¶ 38)

It is on the basis of the forgoing facts, for the most part the admissions of the Complainant, that Respondents move for Partial Summary Decision dismissing the Complainant's complaint for reparations on the grounds that since Complainant had knowledge sufficient for the accrual of its claims at least by November 23, 2011, more than three years prior to the filing of the Complaint herein (November 28, 2014), the reparation claims are time-barred. Further, as the claims for the allegedly wrongful assessment of freight charges and allegedly wrongful shipping practices were released for a period covering all of Complainant's shipments with EUL, the claims for reparations is barred by the terms of the Settlement Agreement and Mutual Release.

ARGUMENT

While the Commission has no procedural summary decision rule, the Commission follows the Federal Rules of Civil Procedure and pertinent case law to the extent consistent with sound administrative practice (*Maher, supra* at unnumbered page 4). Fed. R. Civ. P. 56 governs motions for summary judgment, and provides that:

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law".

POINT ONE:

THE COMPLAINANT'S REPARATION CLAIM IS BARRED BY THE STATUTE OF

⁵ As Complainant's claims arose in connection with specific shipments, all of which have been delivered, whatever violations of the Shipping Act are alleged were all fixed in time against the particular shipments, and are not "continuing".

LIMITATIONS

As the running of the statute of limitations is an affirmative defense, the burden is on the Respondents to show that the statute has run. Once the Respondents have shown such facts, the burden shifts to the Complainant to establish an exception to the statute of limitations. *Maher*, *supra* at unnumbered pages 4-5, *citing*, *inter alia*, *Campbell v. Grand Trunk W.R.R. Co.*, 238 F.3d 772, 775 (6th Cir. 2001).

Complainant did business with Respondent EUL from about 2007 to 2011 (FMC Complaint, ¶ 12); Certification of Michael Hitrinov, \P ____). The last shipments⁶ were booked in the period from August 22, 2011 to November 11, 2011, *i.e.*, before November 23, 2011, the date of the DNJ Complaint (Hitrinov \P 3; DNJ Complaint, \P 30-34).

Complainant now seeks reparations for an unknown number of shipments, but claims damages "in excess of \$400,000.00" as "a result or [R]espondents' ... violations of the Shipping Act"; especially "overcharging the Complainant" and delaying delivery based on the allegation that bills of lading were not issued (FMC Complaint, sec. V. A.).

The Shipping Act and Rule 62 of the Commission's Rules of Practice provide that a complaint seeking reparations must be filed within three years after the claim accrues. (46 USC 41301 (a); 46 CFR 502.62 (a) (4) (iii)).

The Commission has held that "a claim accrues (and the statute of limitations begins to run) 'when a defendant commits an act that injures a plaintiff's business," *Maher, supra* at unnumbered page 9 citing *Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321, 338 (1971).

The Supreme Court has recently reaffirmed that rule:

"In common parlance a right accrues when it comes into existence ...' United

⁶ The "C", "D" and "E" shipments.

States v. Lindsay, 346 U.S. 568, 569 (1954). Thus the 'standard rule' is that a claim accrues 'when the plaintiff has a complete and present cause of action.'

Wallace v. Kato, 549 U.S. 384, 388 (2007)" Gabelli v. Securities and Exchange Commission, 568 U.S. (2013).

In this case, the FMC Complaint was filed on November 28, 2014. Accordingly, any right of the Complainant that accrued prior to November 29, 2011 is now time-barred.

In the instant matter, Complainant complains of alleged violations of the Shipping Act. All of those claims accrued to the Complainant prior to November 29, 2011, when the Complainant not only knew of the operative facts, but had already brought suit against the Respondents on those facts. The DNJ Complaint is dated and was filed on November 23, 2011 – more than three years before the current Complaint was filed with the Commission. (The DNJ Complaint is attached as Appendix Exhibit 2; the Docket Sheet showing that the DNJ Complaint was filed the same day, is attached as Appendix Exhibit 9.)

Comparing the allegations and conclusions of the FMC Complaint with the allegations of the DNJ Complaint, it is evident that Complainant Baltic had actual knowledge of the facts of the situation and facts sufficient to file a Complaint for redress of the injury; and even to claim that the operative facts amounted to a violation of the Shipping Act. ("Plaintiff incorporates ... the preceding paragraphs ... By reason of the aforesaid ... the imposition of false and excessive shipping charges, both prospectively and retroactively, and the unlawful seizure of Plaintiff's cargo is a violation of the Shipping Act of 1984, as well as the rules and regulations promulgated by the Federal Maritime Commission. As a direct and proximate result of Defendants' unlawful activities, Plaintiff suffered damages and losses in excess of \$75,000".) (DNJ Complaint, ¶¶ 59-62; "Count 1") (emphasis added)

In its FMC Complaint, Baltic alleges that the Respondent EUL violated the Shipping Act by:

• "charging Complainant rates greater than those charged other shippers" (¶ V.A.);

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⁷ The Commission may take judicial notice of the docket sheet under FRE 201 (b) (2); and accept the fact of the filing as an evidentiary admission under FRE 801 (d) (2).

- "charging Complainant rates greater than those reflected in its published tariff" (¶ V.B.);
- "failing to keep open for public inspection in its tariff system tariffs showing all its rates, charges, classification rules and practices ..." (¶ V.C.);
- "failing to provide Complainant with (1) proper and lawful documents of owner-ship (bills of lading); (2) shipping invoices; and (3) the terms and conditions of transport ... Respondents failed to deal in good faith and provide proof of owner-ship with a correct original bill of lading and contract of transport in a timely manner" (¶ V.D.).

Assuming that, if proven, such allegations amount to Shipping Act violations, each is time barred.

Complainant complains that EUL charged rates greater than it charged other shippers and greater than its tariff rates (FMC Complaint, ¶ V.A., V.B.). The freight charges were negotiated prior to booking the shipments. Baltic must have understood that if it was negotiating rates, other shippers were negotiating rates as well. It must have known that it was at risk of not negotiating the lowest rates. (Apparently it was satisfied with the rates – given that it shipped over 4,000 containers with EUL.) Since all of Baltic's rates were negotiated and applied to EUL shipments more than three years prior to the FMC Complaint, the claims for "higher rates" are time-barred.

Complainant complains that EUL failed to keep its tariff open for public inspection (FMC Complaint ¶ V.C.). If true (EUL denies this, Hitrinov ¶38), the operative time of such offense would have been prior to the negotiation and agreement on freight rates, and making bookings on the basis of such negotiated rates. As all such acts *vis-à-vis* Baltic and EUL occurred more than three years prior to the FMC Complaint, the claim is time-barred.

Further, Baltic had constructive notice of the contents of EUL's tariff (*Fry Trucking Co. v. Shenandoah Quarry, Inc.* 628 F.2d 1360, 1363 (D.C. Cir 1980) ("the shipper is

charged with constructive notice of the actually filed rate⁸).

Accordingly, Baltic had full actual or constructive knowledge of all of the facts related to claims with respect to tariff irregularities and "higher rates", and as such knowledge was operative and known more than three years prior to the FMC Complaint, and the claims are, accordingly, time-barred.

Complainant complains that EUL failed to provide bills of lading, freight invoices and the terms of transport (FMC Complaint V.D.).

It must be noted that Complainant's Shipping Instructions all called for "Telex Release" or "Express Release", *i.e.*, it was the Claimant itself who requested that no bills of lading (which would have had the terms of transport) be issued.

Insofar as any post-shipment request for bills of lading and other shipping documents is concerned, such requests were made when Claimant was trying to obtain its cargo without paying the charges demanded by EUL. In any event, such requests were made prior to the New Jersey lawsuit, and, being more than three years prior to the FMC Complaint, are time-barred.

Finally, it was the parties' practice not to issue individual invoices, but rather to exchange payment data (amount and payment status for each shipment) on spread-sheet statements. All of this was known to the Claimant more than three years prior to filing the FMC Complaint, because it was the amended spread-sheet that contained the additional freight charges which ignited the dispute that resulted in the New Jersey lawsuit - more than three years before the filing of the FMC Complaint (see DNJ Complaint ¶¶ 39-41). The claims for failing to provide bills of lading, terms of transport and invoices are time-barred.

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⁸ Fry itself citing Nyad Motor Freight v. W.T. Grant Co., 486 F.2d 112 (2d Cir. 1973); Louisville & N.R.R. v. Maxwell, 237 U.S. 94, 97 (1915); and Bowser & Campbell v. Knox Glass, Inc., 390 F.2d 193, 196 (3d Cir. 1968); all of which are cited in "Order Denying Respondent's Motion to Dismiss", Streak Products, Inc. v. UTi, United States, Inc., Docket No. 13-04 (October 23, 2013), p. 12 (Guthridge ALJ)

The acts complained of in the FMC Complaint were precisely the acts complained of in the DNJ Complaint. As the facts of the alleged EUL "failures" were fully known to Baltic and occurred more than three years prior to the FMC Complaint, the claims are time-barred. The FMC Complaint must be dismissed, and attorneys' fees awarded.

POINT TWO:

THE COMPLAINANT'S CLAIMS FOR REPARATIONS ARE BARRED BY THE SETTLEMENT AGREEMENT AND MUTUAL RELEASE

Shortly after Baltic filed the 2011 DNJ lawsuit, the parties entered into the Settlement Agreement and Mutual Release. By its terms, the Settlement Agreement and Mutual Release provided that EUL was released from any claims that Baltic had or might have had arising from the assessment of shipping charges and alleged delivery irregularities.

Basic contract principles apply to the interpretation of settlement agreements. New York State Electric & Gas Corp. v. F.E.R.C., 875 F.2d 43, 45 (3d Cir. 1989). Federal courts apply state law in determining whether a settlement agreement was formed. See T Street Development, LLC v. Dereje and Dereje, 586 F.3d 6, 11 (D.C.Cir. 2009). Here New Jersey law applies per the terms of the Settlement Agreement and Mutual Release (Art. 9). Under New Jersey law, "An agreement to settle a lawsuit is a contract which, like all contracts may be entered freely into, and which a court, absent a demonstration of 'fraud or other compelling circumstances' shall honor and enforce as it does other contracts". Pascarella v. Bruck, 462 A.2d 186, 190 (N.J. Super 1983) (quoting Honeywell v. Bubb, 325 A.2d 832, 835 (N.J. Super. 1974).

"The polestar of contract construction is to discover the intention of the parties as revealed in the language used by them. Karl's Sales & Serv., Inc. v. Gimbel Bros., Inc., 249 N.J. Super. 487, 492 (App. Div.), certif. denied, 127 N.J. 548 (1991).

In this case the parties could have not been more clear as to their intent in entering into the Settlement Agreement and Mutual Release. After reciting the facts that led up to the New Jersey lawsuit, the Settlement Agreement and Mutual Release explained that "... the

Parties are desirous of amicably settling their differences and disputes ...". The Settlement Agreement and Mutual Release then explained that the Claimant's containers would be delivered against additional payments being made.

The Settlement Agreement and Mutual Release provided that once payment and delivery were effected, the slate would be wiped clean.

Specifically, the parties released each other from

"any and all manner of claims ... [for] compensation of any nature whatsoever that each party now has or may have had ... in any way growing out of shipping charges related to Baltic's cargo and any claims ... [or] related go the delay in releasing said cargo" (Art. 5) (emphasis added)

To make sure that there were no misunderstandings as to the full extent of the effect of the Settlement Agreement and Mutual Release, the parties undertook that the claims being settled were those arising "from the beginning of time up to the date of this release" (*Id.*).

But Baltic and the Respondents herein (Respondent Hitrinov was also a party to the New Jersey lawsuit and the Settlement Agreement and Mutual Release) did not rest there, they recited that the parties had "had the opportunity to make whatever investigation or inquiry may have been deemed necessary" (Art. 7 (b)), and that they had acted on the advice of counsel (Art. 14).

They then agreed to the discontinuance of the NJ lawsuit, which included the alleged Shipping Act violation claims (see DNJ Complaint, Count 1, ¶ 59-62). Not only was the action discontinued, it was "withdrawn and dismissed, with prejudice, against all parties" (Art. 6).

The intent of the parties is clear. They knowingly and intentionally wiped the slate clean. No claim of any sort, known or unknown, discovered or undiscovered survived.

Accordingly, the Claimant may not now be heard about late-"discovered" claims. The Claimant had brought Shipping Act claims, and then irrevocably released them.

The Settlement Agreement and Mutual Release barred the bringing of the same Shipping Act charges before the Federal Maritime Commission. The FMC Complaint must be dismissed, and attorneys' fees awarded.

CONCLUSION

As the facts and claims now asserted accrued more than three years prior to the filing of the FMC Complaint; and as the Complainant had "discovered" all of the material facts more than three years prior to the filing of the FMC Complaint, the Complainant's claim for reparations must be dismissed as time-barred, and attorneys' fees awarded.

Further, as the claims raised in the Complaint were released and settled by the Terms of the Settlement Agreement and Mutual Release, the Complainant's claim for reparations must be dismissed, and attorneys' fees awarded.

Respectfully submitted,

By:

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Dated in Short Hills, NJ this day of 23rd of March, 2015.

APPENDIX EXHIBIT 1

FMC Complaint

DNJ Complaint (11/23/2011)

Settlement Agreement and Mutual Release

Certification of Michael Hitrinov

Correspondence between Baltic and EUL ("Payments are made according to agreed terms ...")

Specimen Baltic shipping instructions ("Express Release", "Telex Release")

Spreadsheet showing: the date of Baltic's shipping instructions; location in the DNJ Complaint and Settlement Agreement for each shipment identified in Complainant's Exhibits "C", "D" and "E"

Spreadsheet showing the "on board" date for each shipment identified in Complainant's Exhibits "C", "D" and "E"

DNJ lawsuit Docket Sheet

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the Memorandum in Support of Respondents' MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION FOR PARTIAL SUMMARY DECISION DISMISSING COMPLAINT FOR REPARATIONS ON THE BASIS OF (1) THE CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS; AND (2) THE CLAIM IS BARRED BY THE SETTLEMENT AGREEMENT AND RELEASE dismissing Complainant Baltic Auto Shipping, Inc.'s Complaint for Reparations upon Complainant's counsel, Marcus A. Nussbaum, Esq., with the address of P.O. Box 245599, Brooklyn, NY 11224 by first class mail, postage prepaid, by fax (347-572-0439) and by email (marcus.nussbaum@gmail.com); and that the original and five (5) copies are being filed with the Secretary of the Federal Maritime Commission.

Gerard S. Doyle, Jr.

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Michael Khitrinov, and

Empire United Lines, Co., Inc.

Dated in Short Hills, NJ. this 23rd day of March, 2015.